Ethical Issues and Criminal Practice

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Crime Victims

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INTRODUCTION

These materials focus on ethical issues implicated in criminal cases, including issues that may arise when dealing with a "difficult victim" in a criminal case. At times it seems impossible to comply with *all* of the rules at once. As the "Scope" portion of the RPC stated, "the Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." Scope, ¶ [1], Rule 407, SCACR.

Your behavior in dealing with that victim may implicate statutory provisions and may also contravene the Rules of Professional Conduct (RPC) and, therefore, get you into trouble with the Supreme Court. It is a delicate balance and the rules may require behavior that seems counterintuitive. But, as Professor Jon Thames once said in his class on Professional Ethics, "where the Rules of Professional Conduct are concerned, yo' ass is bare!"

These materials are a snapshot of Rules that bear on some of the more common issues that impact lawyers who deal with criminal cases and crime victims. This list is by no means a complete outline of issues you may face. This outline covers the following specific issues:

I. Confidentiality (Rule 1.6, RPC)
II. Conflict of Interest: Current Clients (Rule 1.7, RPC)
III. Fairness to Opposing Counsel (Rule 3.4, RPC)
IV. Trial Publicity (Rule 3.6, RPC)
V. Special Responsibilities of a Prosecutor (Rule 3.8, RPC)
VI. Truthfulness in Statements to Others (Rule 4.1, RPC)
VII. Communication with Person Represented by Counsel (Rule 4.2, RPC)
VIII. Dealing with Unrepresented Person (Rule 4.3, RPC)
IX. Respect for Rights of Third Persons (Rule 4.4, RPC)
X. Responsibilities of Partners, Managers, and Supervisory Lawyers (Rule 5.1, RPC)
XI. Responsibilities of a Subordinate Lawyer (Rule 5.2, RPC)
XII. Responsibilities Regarding Nonlawyer Assistants (Rule 5.3, RPC)
XIII. Misconduct (Rule 8.4, RPC)
XIV. Grounds for Discipline (Rule 7, RLDE)
VI. Civility Oath (Rule 402(h), SCACR)

As the list demonstrates, not all of the rules of conduct are found in Rule 407, SCACR, which contains the RPC. Some are found elsewhere. For instance, the civility oath is found in Rule 402, SCACR

Importantly, Rule 413, SCACR, provides additional rules governing lawyer conduct and contains the Rules for Lawyer Disciplinary Enforcement (RLDE). If you have not read these rules, then do so. Study specifically Rule 7, RLDE, which provides "Grounds for Discipline." This Rule provides *separate* grounds apart from the RPC for imposing discipline upon lawyers who commit misconduct.

I. Confidentiality (Discovery Issues, Technology and War Stories)

Confidentiality is governed by **Rule 1.6, RPC**, which provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer **may** reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(4) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(5) to secure legal advice about the lawyer's compliance with these Rules;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(7) to comply with other law or a court order.

(Underline and bold added). The Comments to the Rule explain:

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b)

and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(g) for the definition of informed consent. Confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

[5] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[6] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for

example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[7] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. The lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. Paragraph (b)(2) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[8] Paragraph (b)(3) does not limit the breadth of Paragraph (b)(1), but describes one specific example of a situation in which disclosure is permitted to prevent a criminal act by the client. Paragraph (b)(3) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(e), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(3) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[9] Paragraph (b)(4) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the

client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(4) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[10] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[11] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(6) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[12] A lawyer entitled to a fee is permitted by paragraph (b)(6) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[13] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(7) permits the lawyer to make such disclosures as are necessary to comply with the law.

[14] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(7) permits the lawyer to comply with the court's order.

[15] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[16] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(7). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[17] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[18] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty,

> however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.
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> **Former Client**
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> [19] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

(Underline added).

This Rule is probably one of the most misunderstood rules in the RPC. The ABA recently considered an amendment to the Model Rule 1.6 on the premise that any disclosure of facts about a client's case, even "war stories," may violate the rule. The Supreme Court of South Carolina has not indicated any intent to revisit this Rule or adopt such a restrictive view.

Some recent examples of violation of Rule 1.6:

1. *Matter of Lord*, 421 S.C. 394, 807 S.E.2d 696 (2017)

Lawyer disclosed client's confidential information online in response to a negative review on AVVO, and subsequently failed to remove the confidential information. Public reprimand.

2. *Matter of Emery*, 419 S.C. 498, 799 S.E.2d 295 (2017)

Respondent maintained a law firm profile on www.facebook.com. Both respondent and a paralegal employed through Precision Paralegal created content for the Facebook page. Respondent did not adequately monitor the posts made by the contract paralegal. Respondent acknowledged the following error on her Facebook page:

> The paralegal created Facebook posts congratulating respondent's clients after each real estate closing. Respondent did not have her clients' permission to post their names and other information about their legal matters on Facebook.

3. *In re Cooper*, 397 S.C. 339, 725 S.E.2d 491 (2012)

> In April 2008, Respondent was appointed to represent Complainant through his contract with the Dorchester County Public Defender's office. During the case,

Respondent received discovery materials from the solicitor's office. While in court on another matter, Respondent was approached by Complainant's cellmate. The cellmate informed Respondent that Complainant wanted Respondent to send the discovery materials via the cellmate. Respondent complied with the request and gave the discovery materials to the cellmate. Respondent did not have written permission from Complainant instructing him to give the discovery materials to the cellmate and had not spoken directly with Complainant regarding this transmission. After Respondent's contract with the Public Defender's office expired on June 30, 2008, new counsel was appointed to represent Complainant. Respondent admitted that his actions were improper.

4. *In re Poff*, 394 S.C. 37, 714 S.E.2d 313 (2011)

Respondent admits to violating Rule 1.6(a), RPC, Rule 407, SCACR, by disclosing private details of the circumstances surrounding Assistant's divorce action to his friend through e-mail. These disclosures included intimate details about Assistant's marital relationship and the financial settlement Respondent secured for her.

* * *

Assistant worked for Respondent from June 7, 2005 until May 4, 2007. During this time, they shared a good working relationship and Assistant considered them to be friends. Assistant claims she was unaware that Respondent had feelings beyond friendship until May 2, 2007, when Respondent gave her a romantic birthday card coupled with a typed note that revealed his feelings for her.

On May 4th, while looking in Respondent's office for a client file, Assistant noticed an e-mail on Respondent's computer of which she was the subject. The e-mail referenced Assistant in a sexually explicit manner. Assistant immediately printed the e-mail and left the office with the intention of never returning.

At home, Assistant used Respondent's password to access his e-mail and printed the e-mails Respondent exchanged with his friend during the time she worked for Respondent. These e-mails contained offensive and objectifying language about Assistant, unauthorized photographs of Assistant, and confidential information about her divorce settlement. It is undisputed she accessed Respondent's e-mails for her own purposes and not in furtherance of any duty she owed Respondent as an employee.

5. *In re Sturkey*, 376 S.C. 286, 657 S.E.2d 465 (2008)

ODC received a complaint from the husband of Client H, alleging respondent engaged in confidential conversations with Client H in front of law enforcement

officers and respondent failed to provide her with competent and diligent representation.

The Court agreed with the Panel's finding of a violation of Rule 1.6 with regard to Client H.

6. *In re Boyce*, 364 S.C. 353, 613 S.E.2d 538 (2005)

Borrower told respondent that the attorney's fee was to be paid by Wells Fargo. When Wells Fargo did not pay the $150.00 fee, respondent faxed a letter to Borrower and to Borrower's employer at their place of business. The letter threatened to sue both Borrower individually and the employer's business and to send a copy of the lawsuit to both the Attorney General and the Better Business Bureau so as to gain an advantage in the collection of her civil debt. Respondent's letter threatened treble damages even though she would not be entitled to treble damages under South Carolina law.

Neither Borrower's employer nor the employer's business were a party to the loan. Neither Borrower's employer nor his business were clients of respondent. Despite this fact, respondent revealed information relating to her representation of Borrower to his employer without Borrower's consent.

The Court found a violation of Rule 1.6.

7. *In re White*, 363 S.C. 523, 611 S.E.2d 917 (2005)

Respondent breached confidentiality by discussing in detail the facts of [Client A's] case with his wife, who then shared the details with Client A.

8. *Lucas v. State*, 352 S.C. 1, 572 S.E.2d 274 (2002)

Issue on Appeal: "Where an attorney forms a good faith basis for suspecting his client is about to present perjured testimony, and thereafter reveals the suspected perjury to the trial court and moves to be relieved as counsel, does the trial court's denial of the motion to be relieved constitute an abuse of discretion, depriving the defendant of a fair trial?"

The Court stated:

Pursuant to Rule 407, SCACR, Rules of Professional Conduct (RPC), Rule 3.3:

(a) A lawyer shall not knowingly….

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of

its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1. 6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Rule 1.6(b) of the RPC permits an attorney to reveal client confidences to the extent the lawyer reasonably believes necessary ... [t]o prevent the client from committing a criminal act.... The notes following Rule 1. 6 recognize an exception to the general prohibition against disclosure in that a lawyer may not counsel or assist a client in conduct that is criminal or fraudulent, see Rule 1.2(d), and has a duty under Rule 3.3(a)(4) not to use false evidence. If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1)(lawyer must withdraw from representation if representation will result in violation of the Rules of Professional Conduct or other law).

In *Matter of Goodwin*, 279 S.C. 274, 305 S.E.2d 578 (1983), this Court addressed the appropriate action of a trial judge when faced with the situation of an attorney attempting to withdraw due to suspected client perjury. We stated,

> While an attorney has an ethical duty not to perpetrate a fraud upon the court by knowingly presenting perjured testimony, the defendant has a constitutional right to representation by counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963). Had the trial judge allowed the withdrawal, any new attorney he appointed would, if faced with the same conflict, have moved to with-draw, potentially resulting in a perpetual cycle of eleventh-hour motions to withdraw. Worse, new counsel might fail to recognize the problem and unwittingly present false evidence.FN5
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> FN5. Although language in Goodwin indicated counsel was prohibited from disclosing the suspected perjury, it was written in 1983, prior to adoption of the Rules of Professional Conduct, which became effective in September 1990, and which specifically permit disclosure of client confidences if necessary to prevent a criminal act.

> ... [M]otions to withdraw must lie within the sound discretion of the trial judge. In making the decision, the trial court must balance the need for the orderly administration of justice with the fact that an irreconcilable conflict exists between counsel and the accused. The court should consider the timing of the motion, the inconvenience to the witnesses, the period of time elapsed between the date of the alleged offense and the trial, and the possibility that any new counsel will be confronted with the same conflict.

279 S.C. at 276-77, 305 S.E.2d at 579 (emphasis supplied). Here, it is patent that any new attorney would have been confronted with the same dilemma. Moreover, the motion to be relieved came nearly half way through a very serious trial. We find no abuse of discretion in the trial court's denial of the motions to be relieved and for a mistrial.

II. Conflicts of Interest: Current and Former Clients; Screening

The primary rules governing conflicts of interest are found in Rules 1.7 through 1.14. Some of the more common issues are as follows.

A. Current Clients

Rule 1.7 governs conflicts involving "current clients." The Rule provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> > (1) the representation of one client will be directly adverse to another client; or
> >
> > (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
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> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
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> > (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Pertinent **comments** to Rule 1.7 explain:

Prohibited Representations

[12] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b) some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[13] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[14] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

* * *

Conflicts in Litigation

[21] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or

liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[22] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

* * *

[23a] A lawyer serving as a part-time prosecutor is not necessarily disqualified from simultaneously representing other civil or criminal defense clients in private practice. If the prosecutions handled by the lawyer are limited in nature and scope, the lawyer may be able to represent other clients in criminal or civil matters that are not related to any of the cases that the lawyer has prosecuted.

(Underline added).

Rule 1.8, RPC, adds specific rules governing conflicts for current clients. Many parts of Rule 1.8 might arise in a specific circumstance, but the most common is found in Rule 1.8(g), which provides:

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Rule 1.8(g) (Underline added). The Comments to the Rule explain:

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(g) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

(Underline added).

Rule 1.10 provides in part:

(e) A lawyer representing a client of a public defender office, legal services association, or similar program serving indigent clients shall not be disqualified under this Rule because of the program's representation of another client in the same or a substantially related matter if:

(1) the lawyer is screened in a timely manner from access to confidential information relating to and from any participation in the representation of the other client; and

(2) the lawyer retains authority over the objectives of the representation pursuant to Rule 5.4(c).

(Underline added). The comments explain:

[9] Rule 1.10(e) allows programs providing legal services to indigents to avoid imputed disqualification by screening lawyers from conflicting matters within the office. See Rule 1.0([m]) for screening procedures. The authorization of screening is intended to increase the number of persons to whom each program can provide legal services, while at the same time protecting the clients from prejudice. Paragraph (e) applies only to programs of the type delineated and does not authorize screening by private law firms to avoid imputed disqualification.

Rule 1.0(m) sets forth the screening procedures. The rule states:

> (m) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

The Comments to Rule 1.0 explain:

> **Screened**
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> [8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.8(l), 1.10(e), 1.11, 1.12 or 1.18.
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> [9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.
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> [10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

B. Former Clients

The primary rules governing former clients are Rule 1.9, Rule 1.11, and Rule 1.12. These rules are fairly fact-specific, and permit a waiver with informed consent.

Rule 1.9 provides:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(Underline added).

Rule 1.11 governs "Special Conflicts of Interest for Former and Current Government Officers and Employees." The Rule provides:

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Rule 1.12 governs a lawyer who was a former judge, arbitrator, mediator or other third-party neutral. The prohibitions and permissions mirror those in Rule 1.11. The Rule provides:

> (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.
>
> (b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.
>
> (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
>
> > (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
> >
> > (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.
>
> (d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

(Underline added).

Some recent examples where the Court found a violation of the conflict rules are:

1. *Matter of Bledsoe,* 422 S.C. 325, 811 S.E.2d (2018)

Lawyer represented client in domestic relations case after client, while represented by another lawyer, lost custody at a temporary hearing. The client's spouse died before the final hearing, and the family court subsequently awarded custody to the spouse's sister and sister's

husband. The client released Lawyer shortly thereafter and got a new lawyer. During the representation, however, Lawyer expressed to the client that he was interested in a sexual relationship with her and asked her to show her breasts to him. She did so, but felt ashamed and humiliated. They did not engage in a sexual relationship. Lawyer agreed his behavior violated Rule 1.7(a)(2) (conflict of interest involving personal interest), 8.4(e) (conduct that is prejudicial to the administration of justice). Public reprimand.

2. *Matter of Swan*, 422 S.C. 328, 811 S.E.2d 777 (2018)

Lawyer represented a criminal client. Over the course of the representation, Lawyer paid the client's bond, permitted client to stay at Lawyer's home (with permission from Lawyer's wife), Lawyer's wife provided client with clothing, and Lawyer provided other assistance (from his operating account or personal funds), including obtaining a driver's license, car insurance, a new cell phone, and a job briefly in Lawyer's office. Lawyer also assisted client in signing up for inpatient drug rehabilitation. Lawyer had negotiated a plea agreement for client and thought the matter would be concluded by the time he began providing her with financial assistance. None of the funds encouraged client to pursue litigation nor did they provide Lawyer a stake in any litigation. Lawyer admitted to violating Rule 1.8, RPC (see Comment 10). Public reprimand.

3. *Matter of Cooper,* 422 S.C. 350, 811 S.E.2d 788 (2018)

Lawyer provided legal advice to her two step-daughters simultaneously, even though there was a significant risk that her representation of either woman would be materially limited by her representation of the other in violation of Rule 1.7(a), RPC. She also did not enter the names in the firm's conflicts system so that another lawyer in the firm was disqualified in an unrelated case due to Lawyer's representation of one of the step-daughters. The facts are lengthy. Public reprimand.

4. *Matter of Rogers,* 421 S.C. 292, 805 S.E.2d 763 (2017)

Lawyer was employed by general counsel at a medical center. A patient at the center had no family or friends to care for her, so Lawyer volunteered to act as her guardian and conservator. Lawyer did not disclose the possible conflicts of interest that could arise out of her appointment with the patient and did not have the patient waive those conflicts. Lawyer billed her time as conservator, which totaled $8,687. Lawyer also hired her son, who she believed had recovered from drug abuse problems, to work on the patient's home. She permitted the son to stay in the home. Unknown to her, the son moved in, vandalized the home, forged the patient's name on the car title and sold the car, and sold some of the patient's possessions. Lawyer reported this to the police. She was also arrested, however, and charged with Failing to Report Exploitation of a Vulnerable Adult, was placed on interim suspension, and participated in PTI. The interim suspension was lifted by the Court's decision to issue a public reprimand. Public reprimand.

III. Communication

As mentioned above, **Rule 1.0** provides definitions for the terminology used in the RPC. For instance:

> (a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.
>
> (b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
>
> (c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.
>
> * * *
>
> (g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
>
> (h) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
>
> * * *
>
> (p) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

The Comments explain:

> **Informed Consent**
>
> [6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a), 1.7(b), and 1.18(d). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.
>
> [7] Obtaining informed consent will usually require an affirmative response by the client or other person. I n general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b), 1.9(a), and 1.18(d). For a definition of "writing" and "confirmed in writing," see paragraphs (o) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (o).

Failure to communicate is the number one complaint that clients make about lawyers. Just for 2010, the following cases described "failure to communicate" as one of the findings of misconduct:

1. *In re Cheatham* , 390 S.C. 439, 702 S.E.2d 559 (2010) (public reprimand for, in part, submitting a proposed order to a family court judge without serving it at the same time and by the same manner on opposing counsel (Rule 5(b)(3), SCRCP)).

2. *Matter of Bodiford*, 390 S.C. 451, 702 S.E.2d 565 (2010) (public reprimand for, in part, lying to a client about the progress of the case the lawyer had failed to file).

3. *In re Kelley*, 390 S.C. 452, 702 S.E.2d 566 (2010) (reprimand for, in part, failing to keep client reasonably informed about the status of the matter).

4. *In re Boney*, 390 S.C. 407, 702 S.E.2d 241 (2010) (disbarred for, among other things, failure to respond to client communications and failing to take appropriate steps to notify clients when she closed her law practice).

5. *In re Thomson*, 389 S.C. 24, 698 S.E.2d 625 (2010) (public reprimand for, in part, failing to keep client reasonably informed regarding the status of the matter, and failing to promptly reply to the client's reasonable requests for information).

6. *In re Holcombe*, 388 S.C. 510, 697 S.E.2d 600 (2010) (two year suspension for numerous acts of misconduct involving failure to notify client of his departure from the firm where he was working; failure to reach a clear understanding with the firm as to whether he or the firm would retain the client's case and associated responsibilities; failing to notify a client of the outcome of a PCR case as well as his right to appeal the court's decision and failing to file a notice of appeal to protect the client's right to appeal the court's decision; and failure to communicate adequately with at least one of the clients).

7. *In re Kellett*, 388 S.C. 365, 697 S.E.2d 536 (2010) (disbarred for numerous acts of misconduct, including failing to inform clients, courts, or opposing counsel of his administrative suspension for failing to comply with mandatory CLE requirements, and numerous counts of failing to communicate with clients; falsely stating to a client that he had served the defendant and/or defense counsel with the pleadings even though he missed a deadline; failing to provide a client with an explanation of the fees and costs for the representation and not providing a written fee agreement for a contingency matter)

8. *In re Gay*, 388 S.C. 280, 696 S.E.2d 586 (2010) (public reprimand for failing to keep clients reasonably informed about their cases).

9. *In re Moody*, 387 S.C. 352, 692 S.E.2d 906 (2010) (two year suspension for, among other things, failing to notify her clients that she had been suspended for failing to comply with license fee and CLE reporting requirements)

10. *In re Witcraft*, 387 S.C. 301, 692 S.E.2d 534 (2010) (two year suspension for, among other things, entering into a contingent fee arrangement that was not in writing; and sending a draft order to the judge after the lawyer had been placed on interim suspension

without informing the judge he had been suspended and then misrepresenting to the judge that he was "closing the office").

11. *In re Brown*, 387 S.C. 305, 692 S.E.2d 536 (2010) (six month suspension for, among other things, failing to communicate with a client regarding a referral to the lawyer but signing consent orders related to discovery issues on the client's behalf, one of which allowed the client's deposition to be taken. However, the lawyer did not appear at the deposition, which had to be rescheduled. Moreover, although the lawyer had been placed on interim suspension, he did not inform opposing counsel of that fact until the date of the rescheduled deposition).

12. *In re Jacobsen*, 386 S.C. 598, 690 S.E.2d 560 (2010) (disbarred for misconduct involving multiple acts of serious misconduct arising out of a bankruptcy practice, including refusing to communicate with clients; negotiating with creditors and settling matters on behalf of debtor clients without appropriate client authority and without informing clients of such action; failing to adequately advise clients regarding the ramifications of certain decisions in their bankruptcy matters; and refusing to communicate with the Bankruptcy Court and the bankruptcy trustees).

More recent cases indicate the problem continues:

1. *Matter of Gorski*, ___ S.C. ___, 817 S.E.2d 289 (2018)

Lawyer failed to keep clients reasonably informed regarding their cases. 12-month suspension.

2. *Matter of Yakobi*, 422 S.C. 355, 811 S.E.2d 791 (2018)

Client hired Lawyer for a domestic relations matter. Over the next two months the client attempted to reach Lawyer by telephone, email, letter and Lawyer's website, but heard nothing. The client fired him and demanded the fee be returned. The client's new lawyer also attempted to contact Lawyer without success. Lawyer stated his paralegal and the paralegal's daughter (who was the receptionist) intentionally deflected attempts at communication by the clients and the new counsel that were intended for Lawyer, including deleting emails sent directly to Lawyer. Lawyer fired those staff members. Upon receiving the Notice of Investigation from ODC, Lawyer hand-delivered a full refund check to new counsel. Lawyer admitted not initiating communication with clients to keep them reasonably informed as to the status of their cases. Public reprimand.

Rule 1.4, RPC, provides: "(a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(g), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer

knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Again, this is one of the chief complaints about lawyers, and is one of the easiest problems to avoid. Return phone calls and respond to letters from clients, judges or other lawyers. Create a telephone log system and check it first thing in the morning. Check off each call as returned. If you cannot make the call yourself, have an assistant or someone else do it for you. Carve out some time each day devoted *solely* to returning calls. Make a note in your case management or note system that the call was returned, and the substance of the communication. Your best defense against a claim of lack of communication is a well-documented file.

IV. Documenting the File

The best defense to most claims of a violation of the RPC is a well-documented file. This serves the dual function of providing evidence to undercut allegations of failure to communicate while permitting anyone who pulls the file to know what has taken place.

At BNTD we used "Needles," a case management program that permits entry of notes and posting of emails and documents. The firm transitioned to "Prevail" just as I left. At ODC we use "Time Matters." Each program will also generate a report of all activity.

Prepare detailed notes of conversations and other interactions with persons relevant to the file. Confirm discussions in writing if possible, and post a copy of the writing to the file. Make certain that deadlines are placed on calendars (yes, plural - redundancy prepares for failure of one mode). Note crucial things with tabs – deadlines, liens, specific instructions from the client. Someone should be able to pick your file up and be able to converse intelligently with the client, another lawyer, or a judge about the status of the case.

If a complaint is made to ODC, your notes may provide a means of defeating spurious or false claims about communication or the goals of the representation.

Although it may seem to be too time consuming to do this, there is NOTHING more time consuming than responding to a complaint about your actions. And if the file is not appropriately documented, you will lack proof and more time will be wasted trying to reconstruct your actions from memory. Do not fall into this trap.

Document, document, document.

V. Duty to Report

The duty to report is found in Rule 8.3, RPC, and is one of the most difficult duties we have as lawyers. The law is a self-policing profession, yet we are all reluctant to flash our badges at times.

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who is arrested for or has been charged by way of indictment, information or complaint with a serious crime shall inform the Commission on Lawyer Conduct in writing within fifteen days of being arrested or being charged by way of indictment, information or complaint.

(b) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(c) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's honesty, trustworthiness, or fitness for office in other respects shall inform the appropriate authority.

(d) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(e) Inquiries or information received by the South Carolina Bar Lawyers Helping Lawyers Committee or an equivalent county bar association committee regarding the need for treatment for alcohol, drug abuse or depression, or by the South Carolina Bar law office management assistance program or an equivalent county bar association program regarding a lawyer seeking the program assistance, shall not be disclosed to the disciplinary authority without written permission of the lawyer receiving assistance. Any such inquiry or information shall enjoy the same confidence as information protected by the attorney-client privilege under applicable law.

Comment

[1] Self regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the

offense. The South Carolina version of paragraph (c) modifies the model version by specifically including "honesty" and "trustworthiness" to parallel the requirement of paragraph (b).

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client lawyer relationship.

[5] Paragraph (e) encourages lawyers to seek assistance from the South Carolina Bar Lawyers Helping Lawyers Committee, from a South Carolina Bar law office management assistance program, or from an equivalent county bar association program without fear of being reported for violating the Rules of Professional Conduct. Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (b) and (c) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

This Rule provides a good deal of leeway in most circumstances. As the comments reveal, not every violation of the RPC or the RLDE require a report – only those that raise "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects...." The comments provide some guidance for applying Rule 8.3.

An excellent discussion of the Rule with references to Ethics Advisory Opinions is found in the book by Professors Wilcox and Crystal that is published by the South Carolina Bar.

Some recent decisions in which a failure to report was part of the finding of misconduct are:

1. *In the Matter of Parrott*, 421 S.C. 105, 804 S.E.2d 852 (2017)

Lawyer failed to notify the Commission on Lawyer Conduct of his arrest on the charge of voyeurism after he used a cell phone to take a photograph up a woman's skirt in a grocery store. That failure violated Rule 8.3 (a), RPC (duty to self-report certain arrests).

2. *In re Herlong*, 416 S.C. 255, 785 S.E.2d 784 (2016)

Lawyer failed to notify the Commission on Lawyer Conduct of his indictment on felony drug charges in violation of Rule 8.3(a), RPC.

3. *In re Rivers*, 409 S.C. 80, 761 S.E.2d 234 (2014)

Lawyer self-reported that 6-years prior the lawyer discovered that his partner was kiting funds in the trust account to cover a shortage in the account. Thereafter, lawyer participated in a plan of self-perpetuating a cycle of misappropriation of client funds.

4. *In re Steinmeyer*, 395 S.C. 296, 718 S.E.2d 426 (2011)

"In 2007, respondent self-reported witnessing her former employer, a lawyer, violate several provisions of the Rules of Professional Conduct. Respondent reported that the lawyer's violations occurred as early as 2004 and admits that her self-report in 2007 was untimely."

5. *In re Bowden*, 364 S.C. 310, 613 S.E.2d 367 (2005)

"Respondent was hired as an associate to manage the Greenville office of the Forquer Law Firm. Respondent worked under the supervision of Robert Forquer who is not licensed in South Carolina and who works in the firm's Charlotte, North Carolina, office. When respondent learned it was the firm's practice to inflate government recording fees on HUD-1 settlement statements, he questioned Mr. Forquer about the practice. Mr. Forquer assured respondent that the practice was ethical and legal."

6. *In re Galmore*, 340 S.C. 46, 530 S.E.2d 378 (2000)

"Respondent took over representation of Jasper Boykin in an action against Allstate Insurance Company when Ernest Yarborough, who originally represented Mr. Boykin, was

suspended from the practice of law. During the course of the litigation, respondent contacted Thomas C. Salane, Esquire, attorney for Allstate, and indicated that he was going to move to be relieved as counsel due to his inability to handle the matter. A motion to withdraw was filed and granted on August 1, 1997.

However, respondent reappeared as counsel for Mr. Boykin, and continued to represent him until several months later when he again requested to be relieved. On December 5, 1997, an order was issued allowing respondent to be relieved as counsel. Mr. Boykin was thereafter represented by different counsel.

On April 30, 1998, a settlement of the litigation was arranged by the parties and confirmed in writing. A conditional order of dismissal was issued, allowing either side to petition for reinstatement if the settlement was not consummated within sixty days.

On May 12, 1998, an order for hearing on settlement was issued. The order was precipitated by a letter from Mr. Boykin to the judge, complaining that he did not agree to the settlement. Mr. Boykin stated in the letter that he had spoken with Yarborough and respondent about his case and had agreed to pay Yarborough $2,300 to oversee respondent's handling of the case and to pay respondent an additional $1,000.

Respondent later maintained he was unaware of the payment by Mr. Boykin to Yarborough. Respondent refused to allow Yarborough to work on the case or supervise his work. However, respondent failed to report to the Commission Yarborough's offer to practice law while under suspension."

VI. Civility Oath

The "Civility Oath" is found in Rule 402(h), SCACR. Anyone who is admitted to practice law in South Carolina has not only read it, they have sworn to uphold its provisions. The Supreme Court takes this oath very seriously.

For instance, Rule 7 (a)(6), RLDE, provides it "shall be a ground for discipline for a lawyer to...violate the oath of office taken to practice law in this state and contained in Rule 402(k), SCACR." This can also lead to a finding that the lawyer violated Rule 8.4(e), RPC, which provides "It is professional misconduct for a lawyer to.... engage in conduct prejudicial to the administration of justice...." The Comments to Rule 8.4 explain:

> [3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (e) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (e). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

Note that last sentence. A *Batson* violation, standing alone, does not establish a violation of Rule 8.4(e).

The Supreme Court has recently expressed concern over civility, even after adopting the "new" oath. The Court stated:

> [F]or the benefit of the bar, we take this opportunity to address what we see as a growing problem among the bar, namely the manner in which attorneys treat one another in oral and written communication. We are concerned with the increasing complaints of incivility in the bar. We believe United States Supreme Court Justice Sandra Day O'Connor's words elucidate a lawyer's duty: "More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers." Sandra Day O'Connor, *Professionalism*, 76 Wash. U. L.Q. 5, 8 (1998).

In re Anonymous Member of South Carolina Bar, 392 S.C. 328, 332, 709 S.E.2d 633, 635 (2011).

Some recent decisions discussing professionalism or civility are:

1. *Matter of Peeler*, Op. No. 27830 (S.C. Sup. Ct. filed Aug. 22, 2018) (Shearouse Adv. Sh. No. 34 at 10)

Probate judge admitted calling court personnel "heifers" and "DW" (double wide). He claimed he was joking when he made the comments. He also admitted to "pranks and jokes" he instigated and participated in during working hours and which were unprofessional and discourteous. The judge admitted by this behavior he violated Canon 1A, Rule 501, CJC (a judge should participate in establishing and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2A (a judge shall avoid impropriety and the appearance of impropriety by acting at all times in a manner that promotes public confidence in the integrity of the judiciary); and Canon 3B(4) (a judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity). Judge had resigned so the strongest sanction available was a public reprimand with the condition that the judge not seek judicial office without written permission from the Court and notice to ODC.

2. *Matter of Swan*, 422 S.C. 328, 811 S.E.2d 777 (2018)

On several occasions, Lawyer made sexually inappropriate comments to his client on the telephone while she was in jail - he did the same on one occasion with another client. There was no evidence they had sexual relations or engaged in inappropriate touching, or that Lawyer requested sexual services in exchange for anything. Lawyer contended the comments were merely "raunchy banter" or joke between jailed clients and their lawyer, and he did not expect them to become public. The Court stated, "our review of the portions of the telephone conversations at issue revealed [Lawyer's] comments to be sexually explicit and highly offensive in nature. We find such comments made to a client by a member of the legal profession are entirely inappropriate and they will not be tolerated." Lawyer admitted to violating the oath found in Rule 402(h)(2), SCACR. Public reprimand.

3. *In re DuPree*, 401 S.C. 553, 737 S.E.2d 849 (2013)

"While vacationing in Utah, respondent was a passenger in a vehicle that was pulled over by law enforcement on March 22, 2012. Utah Highway Patrol Trooper David Wurtz asked the driver for his license, vehicle registration, proof of insurance, and other information. Trooper Wurtz began to ask the driver about whether he had been drinking. Respondent repeatedly interrupted and told the driver not to answer the trooper's questions. Respondent told Trooper Wurtz he was a lawyer and that the driver did not have to do what the trooper asked.

Trooper Wurtz called for backup and other troopers arrived on the scene. When Trooper Wurtz requested the driver exit the vehicle, respondent, who was obviously intoxicated, became belligerent, repeatedly used profanity, and refused to cooperate with the troopers' requests to calm down. Respondent again reminded the troopers he was a lawyer. When the troopers told respondent to stay in the vehicle, he tried to get out. A few minutes later, when the troopers

asked respondent to get out of the vehicle so it could be towed, respondent refused and locked the vehicle doors every time the troopers unlocked the doors. Respondent continued to berate the troopers and call them derogatory names.

The troopers were required to use force to remove respondent from the vehicle. One of the troopers deployed his TASER, but it did not function properly. When the troopers managed to remove respondent from the vehicle, respondent attacked the troopers. During the attack, respondent struck Trooper Wurtz in the mouth and bit him on the arm. Eventually, respondent was subdued and taken into custody. He was arrested and charged with two counts of assault on a police officer, disorderly conduct, resisting arrest, and public intoxication.

On September 12, 2012, respondent, through counsel, pled guilty to two counts of assault, one count of interference with a peace officer making a lawful arrest, and one count of failure to disclose identity, all misdemeanors. The pleas were entered *nunc pro tunc* to March 22, 2012, the date of respondent's arrest. Respondent was sentenced to one hundred and eighty (180) days on each charge, concurrent. The sentences were stayed and respondent was placed on probation for six (6) months under the following conditions: maintaining good behavior and no violation of any laws, payment of a $1,500.00 fine, payment of $840.52 to the Utah Worker's Compensation Fund, receipt of a substance abuse evaluation and completion of all recommended treatment, delivery of two letters of apology, one to Trooper Wurtz and one to another trooper, and service of one (1) day in the Summit County Jail with credit for one (1) day previously served. On September 17, 2012, the Third District Court in and for Summit County, Utah, found the conditions had been satisfied."

4. *In re Boyd*, 399 S.C. 356, 731 S.E.2d 876 (2012)

[O]n August 9, 2010, the Court suspended respondent from the practice of law for six months. Id. He was reinstated to the practice of law on June 14, 2011. *In the Matter of Boyd*, 393 S.C. 159, 711 S.E.2d 898 (2011). Prior to his suspension, respondent worked for a law firm. At the time, a law student named Richard Thomas Roe FN1 worked at the same firm.

FN1. Richard Thomas Roe is a pseudonym.

In May 2011, Claimant A had a pending matter before the Workers' Compensation Commission. Michael Petit, Esquire, represented the insurance carrier on Claimant A's claim.

On May 25, 2011, after Richard Thomas Roe was sworn-in as a member of the South Carolina Bar and while respondent was suspended from the practice of law, respondent sent a letter to Mr. Petit on behalf of Claimant A under the assumed name of Tom Roe. The May 25, 2011, letter was on the letterhead of a fictitious law firm that respondent called "Roe Law, LLC." The address on the letterhead was respondent's home address. The telephone number on the letterhead was respondent's cell phone number. Respondent's May 25, 2011, letter included a Notice of Appearance on Behalf of Claimant A with the Workers' Compensation Commission signed by respondent using the assumed name Tom Roe.

Believing that respondent was an attorney named Tom Roe, Mr. Petit prepared a settlement agreement and forwarded it to respondent at the address on the letterhead. On May 28, 2011, respondent signed the settlement agreement on behalf of Claimant A using the assumed name Tom Roe. The settlement agreement was filed by Mr. Petit who was unaware at the time that Tom Roe was a name fabricated by respondent.

On June 9, 2011, respondent sent a copy of the Notice of Appearance on Behalf of Claimant A, signed by respondent using the assumed name Tom Roe, to the Workers' Compensation Commission by email using the email address which included the phrase "tomroelaw@." The same day, the Workers' Compensation Commission issued a notice of settlement hearing to be held on June 14, 2011.

On June 10, 2011, respondent telephoned the South Carolina Bar from his cell phone and left a message identifying himself as Tom Roe and requesting an address change for bar member Tom Roe. A member of the staff at the Bar returned the call and left a voice mail message with instructions about how to change the address.

On June 13, 2011, respondent faxed a document entitled "Termination of Attorney/Client Relationship" to Mr. Petit under the assumed name Tom Roe. On June 14, 2011, the settlement hearing was held by Workers' Compensation Commissioner Derrick Williams. Claimant A did not appear and no one appeared on his behalf.

On June 15, 2011, at approximately 9:00 a.m., respondent called the South Carolina Bar a second time, falsely represented himself as Tom Roe, and requested that the address on file for that attorney be changed. The address respondent requested that the Bar use was his home address. At approximately 10:00 a.m. on June 15, 2011, Commissioner Williams held a conference call in which he called the number in the file for "Tom Roe." Mr. Petit also participated in the conference call. Respondent answered the call and falsely identified himself as Tom Roe. During the conference call, respondent falsely stated that he was a graduate of Clemson University and the Charleston School of Law. He gave Commissioner Williams the bar number for Richard Thomas Roe.

On June 22, 2011, respondent appeared at a rescheduled hearing before Commissioner Williams, falsely identified himself as Tom Roe, and gave a false bar number to the commissioner. At that hearing, respondent requested to be relieved from representation of Claimant A. Commissioner Williams instructed respondent to submit a written motion and proposed order. On June 24, 2011, respondent submitted a Motion to be Relieved as Counsel for Claimant A to the Workers' Compensation Commission. Respondent signed the name "Tom Roe" to the motion.

5. *In re Hursey*, 395 S.C. 527, 719 S.E.2d 670 (2011)

The Panel found Respondent had committed the following Acts: * * * maintained a webpage on MySpace.com that contained profanity and nudity along with the name of his law

firm and the city of its location; among his comments, Respondent stated he would "take the 5th" in regards to what drugs he had done in the past as well as which drugs he had done in the past week (The Disciplinary Counsel Matter).

6. *In re Lovelace*, 395 S.C. 146, 716 S.E.2d 919 (2011)

Respondent represented the plaintiff in a civil suit. On April 2, 2008, the deposition of the plaintiff had just concluded and respondent was preparing to take a second deposition. The deponent in the second case was a defendant in the lawsuit. Respondent asked if anyone wanted to take a break. The defendant, who was seated across the table from respondent, said something to the effect of "No, let's get this crap over with." Respondent then stood up and pointed at the defendant's face and warned him not to speak to him in that manner. The defendant stood up and told respondent not to point his finger at him. Respondent then slapped the defendant in the face.

The defendant initiated criminal charges of simple assault and battery against respondent. Respondent pled "no contest" and was sentenced to payment of a fine.

Respondent self-reported this incident to ODC on the day it occurred.

7. *In re Poff*, 394 S.C. 37, 714 S.E.2d 313 (2011)

The Panel and the Court found the lawyer assisted an employee in defrauding Medicaid. The Court stated:

> Rule 7.4(a)(5) provides a venue for discipline when a lawyer engages in conduct tending to pollute the administration of justice or conduct that brings disrepute to the legal profession. Respondent's assistance in deceiving the government, engagement in fee sharing, mishandling of his trust account, and improper disclosure of confidential client information to a third party certainly brought disrepute to the legal profession. Rule 7.4(a)(6) provides a ground for discipline when a lawyer violates the oath of office. Respondent's actions caused him to violate his oath that he would "respect and preserve inviolate the confidences of my clients" and would "maintain the dignity of the legal system." Rule 402(k), SCACR. We do not believe it was necessary for the Panel to expound upon its reasoning for finding these grounds for discipline, as they are commensurate with its finding that Respondent committed numerous violations of the Rules of Professional Conduct. Like the Panel, we find Respondent in violation of Rule 7(a)(1), 7(a)(5), and 7(a)(6), RLDE, Rule 413, SCACR.

6. *In re Walker*, 393 S.C. 305, 713 S.E.2d 264 (2011)

In August 2010, respondent pled guilty to solicitation of a felony. Specifically, respondent admitted attempting to hire a "hit man" to murder another member of the South Carolina Bar. Respondent paid the "hit man" in part with a post-dated check because he did not have sufficient funds in his account to pay the check's face value. Respondent was sentenced to ten (10) years imprisonment, suspended upon service of three (3) years imprisonment and five years of probation.

8. *In re Anonymous Member of SC Bar*, 392 S.C. 328, 709 S.E.2d 633 (2011)

The formal charges in this matter arose out of a disciplinary complaint regarding an e-mail message Respondent sent to opposing counsel (Attorney Doe) in a pending domestic matter. Respondent represented the mother and Attorney Doe represented the father in an emotional and heated domestic dispute. It was within this context that Respondent sent Attorney Doe the following e-mail (the "Drug Dealer" e-mail):

> I have a client who is a drug dealer on ... Street down town [sic]. He informed me that your daughter, [redacted] was detained for buying cocaine and heroine [sic]. She is, or was, a teenager, right? This happened at night in a known high crime/drug area, where alos [sic] many shootings take place. Lucky for her and the two other teens, they weren't charged. Does this make you and [redacted] bad parents? This incident is far worse than the allegations your client is making. I just thought it was ironic. You claim that this case is so serious and complicated. There is nothing more complicated and serious than having a child grow up in a high class white family with parents who are highly educated and financially successful and their child turning out buying drugs from a crack head at night on or near ... Street. Think about it. Am I right?

Attorney Doe's spouse, also an attorney, filed the complaint in this matter after Attorney Doe disclosed the "Drug Dealer" e-mail to him. At the hearing, Respondent admitted that Attorney Doe's daughter had no connection to the domestic action.

At the hearing, Respondent asserted that the e-mail was in response to daily obnoxious, condescending, and harassing e-mails, faxes, and hand-delivered letters from Attorney Doe. These communications allegedly commented on the fact that Respondent is not a parent and therefore could not advise Respondent's client appropriately. In support of this contention, Respondent submitted five e-mail exchanges between Respondent and Attorney Doe, four of which were dated after the "Drug Dealer" e-mail. In further support of Respondent's assertions, Respondent claimed to possess ten banker's boxes full of e-mails and other documents that constituted daily bullying from Attorney Doe; however, these documents were not produced. Due to a lack of evidence supporting Respondent's assertions, the Panel found Respondent's testimony to be entirely lacking in credibility. Ultimately, the Panel found Respondent was subject to discipline for sending the "Drug Dealer" e-mail to Attorney Doe.

9. *In re White*, 391 S.C. 581, 707 S.E.2d 411 (2011)

"In 2004, Respondent represented the Atlantic Beach Christian Methodist Episcopal ChurchFN1 ("Church") in a legal action it filed against the Town regarding a zoning dispute. The Town Attorney was Charles Boykin. The parties settled the action in 2007. As part of the settlement, the Church's action was dismissed, the Town paid damages to the Church, and the Church promised future compliance with all of the Town's building, permitting, and zoning requirements.

FN1. It also appears in the record as the Christian Methodist Episcopal Mission Church.

On April 30, 2009, Kenneth McIver, the new Town Manager, sent a notice about the need for zoning compliance to the owners of the Church property, Vonetta M. Nimocks and Eboni A. McClary ("Church's Landlords"). In his notice, McIver stated that as part of the prior settlement, "the judge ordered that the Church must comply with the Town's Zoning Ordinances and that a request for compliance must come from you, the owner[s]." McIver copied the notice to the Church's pastor, who gave it to Respondent.

On May 6, 2009, Respondent sent a letter about McIver's notice to the Church's Landlords. Respondent sent copies of his letter to McIver and Boykin. The remarks made by Respondent in his May 6th letter are the subject of this disciplinary proceeding. The letter reads in full as follows:

> You have been sent a letter by purported Town Manager Kenneth McIver. The letter is false. You notice McIver has no Order. He also has no brains and it is questionable if he has a soul. Christ was crucified some 2000 years ago. The church is His body on earth. The pagans at Atlantic Beach want to crucify His body here on earth yet again.
>
> We will continue to defend you against the Town's insane [sic]. As they continue to have to pay for damages they pigheadedly cause the church. You will also be entitled to damages if you want to pursue them.
>
> First graders know about freedom of religion. The pagans of Atlantic Beach think they are above God and the Federal law. They do not seem to be able to learn. People like them in S.C. tried to defy Federal law before with similar lack of success.

McIver delivered the letter to the Town Council, and three council members thereafter filed a disciplinary complaint against Respondent. ODC instituted formal charges against Respondent as a result of his conduct.

At the hearing on June 8, 2010, counsel for ODC stated: "ODC alleges that [Respondent's] statements questioning whether Mr. McIver has a soul, saying that he has no

brain, calling the leadership of the Town pagans and insane and pigheaded violates his professional obligations, which include his obligation to provide competent representation to his clients; his obligation under Rule 4.4 to treat third parties in a way that doesn't embarrass them; Rule 8.4 to behave in a way that doesn't prejudice the administration of justice; and also [ ] the letter was not in conformity with his obligations under his oath of office, Rule 402(k)." Counsel for ODC further alleged that Respondent had failed to cooperate with disciplinary authority by refusing to answer the allegations against him, threatening to sue the complainants for filing the grievance, and questioning ODC's authority.

* * *

Respondent argues the rule contains its own "safe harbor" that protects "uncivil" remarks when they serve other purposes. However, the fact that the letter could have served other purposes does not prevent his conduct from being in violation of Rule 4.4(a). See, e.g., *In re Norfleet*, 358 S.C. 39, 595 S.E.2d 243 (2004) (finding an attorney who became angry and spoke in a threatening manner to a school principal who refused to turn over a student's file had violated Rule 4.4; the attorney was attempting to obtain the file for the otherwise legitimate purpose of using it in litigation).

Moreover, an attorney may not, as a means of gaining a strategic advantage, engage in degrading and insulting conduct that departs from the standards of civility and professionalism required of all attorneys. *See In re Golden*, 329 S.C. 335, 341, 496 S.E.2d 619, 622 (1998) (determining the attorney's conduct in questioning a witness by using sarcasm, unnecessary combativeness, threatening words, and intimidation served no legitimate purpose other than to embarrass, delay, or burden another person and, even if the witness was being uncooperative, it would not justify the attorney's insulting conduct, which was found to have "completely departed from the standards of our profession" as well as "basic notions of decency and civility").

It is clear from the record in this matter that Respondent sent the letter as a calculated tactic to intimidate and insult his opponents. Although Respondent maintains he used many of the words at the request of his client, the Church, Respondent cannot discharge his responsibility for his use of disparaging name-calling and epithets by simply stating he was asked to behave in this unprofessional manner by his client.

Respondent has also justified his conduct by arguing that he has a duty to provide zealous representation. We agree that an attorney has an obligation to provide zealous representation to a client. However, an attorney also has a corresponding obligation to opposing parties, the public, his profession, the courts, and others to behave in a civilized and professional manner in discharging his obligations to his client. Legal disputes are often emotional and heated, and it is precisely for this reason that attorneys must maintain a professional demeanor while providing the necessary legal expertise to help resolve, not escalate, such disputes. Insulting and intimidating tactics serve only to undermine the administration of justice and respect for the rule of law, which ultimately does not serve the goals of the client or aid the resolution of disputes.

* * *

After considering the record in this matter, we conclude Respondent has committed misconduct in the respects identified by the Hearing Panel, except for the allegation regarding the failure to cooperate. We further find the Hearing Panel's suggestion of a definite suspension is appropriate under the circumstances.

Based on Respondent's blatant incivility and lack of decorum in this instance and the aggravating factors found by the Hearing Panel, including his disciplinary history, we impose a definite suspension of ninety days. We further order Respondent to complete the Legal Ethics and Practice Program administered by the South Carolina Bar within six months of reinstatement. Respondent's conduct in this matter reflects poorly on himself as a member of the legal profession and reflects negatively upon the profession as a whole. He represented to this Court at oral argument that in the future he will conduct himself in accordance with the RPC and treat all persons in a civil, dignified, and professional manner as is expected of all members of the South Carolina Bar. We expect nothing less."

10. *In re Danielson*, 391 S.C. 386, 706 S.E.2d 1 (2011)

Respondent agreed to represent a client in a claim against a lender. Respondent obtained a favorable settlement for his client. Counsel for the lender prepared and transmitted a settlement package containing documents to be signed by *388 respondent's client. Opposing counsel set a deadline for the execution and return of the settlement documents.

Respondent had difficulty contacting the client to arrange the execution of the settlement documents and became fearful that his failure to timely reach the client might result in the settlement being withdrawn. Consequently, without the prior consent or knowledge of the client, respondent signed the client's name to the settlement documents, including the release and settlement agreement, the new mortgage, and affidavit of the client. Respondent then signed as witness to the client's signature on the mortgage, falsely indicating that he had witnessed the client sign the mortgage. In addition, respondent had an employee of his law firm falsely sign as witness to the client's signature. Respondent then falsely signed as a notary public on the mortgage. Respondent had the employee falsely witness the client's affidavit and release and settlement agreement. Respondent sent the documents to opposing counsel who had the mortgage recorded in the public record.

Subsequent to the documents being sent to opposing counsel, the client contacted respondent's firm about signing the documents. Respondent readily admitted his misconduct to his partners and self-reported the matter to Disciplinary Counsel. Thereafter, the client signed new settlement documents which were forwarded to opposing counsel. The falsely executed documents were cancelled of record and the new, properly executed documents were recorded in their place.

11. *In re Holcombe*, 388 S.C. 510, 697 S.E.2d 600 (2010)

Respondent worked at Law Firm B from May of 2006 until late February of 2009. When he began work at the firm, he was still working on files from his time with Law Firm A. Law Firm B was generally aware of these holdover cases and expected to be compensated for the time and effort respondent devoted to completing the cases. However, respondent failed to diligently work on several of the cases and failed to keep some of the clients informed of the status of their matters. He also failed to hold separately any unearned fees associated with those cases.

In addition to his continued representation of clients associated with Law Firm A, respondent also continued his representation of other clients without the knowledge or permission of Law Firm B. Respondent did not hold any unearned fees or other funds associated with those cases in a trust account, nor did he perform a conflicts check with Law Firm B with regard to any of the clients. Finally, respondent failed to diligently pursue at least two of the matters and failed to communicate adequately with at least one of the clients.

Respondent also accepted new clients while working at Law Firm B without the firm's knowledge or permission. As with his other clients who were not clients of Law Firm B, respondent failed to maintain a trust account for any unearned fees or other funds associated with the clients. Respondent also failed to diligently pursue the matters that several of the clients hired him to pursue.

Respondent also failed to diligently represent at least two of Law Firm B's clients. In one matter, respondent represented two clients in a civil lawsuit. During the representation, the clients asked respondent to help them incorporate their business. Although respondent prepared the articles of organization, he never filed the appropriate documents or forwarded the clients' checks to the South Carolina Secretary of State. In another matter, respondent represented a client in a domestic action. He failed to comply or respond to numerous requests from the client, failed to comply with the client's request for a copy of a letter respondent wrote to opposing counsel, failed to file a motion at the client's request, and failed to keep the client informed of the status of settlement negotiations and his efforts on the client's behalf.

Respondent accepted another client on behalf of Law Firm B on a matter outside of the firm's normal area of practice. Respondent accepted a $1,000 check from the client and submitted the funds to the firm for deposit. One month later, respondent accepted another $1,000 check from the client. Unlike the first check, respondent negotiated the second check and retained the funds for his own personal use. The client sought a refund after respondent's departure from the firm. Law Firm B refunded $1,312.60 to the client, representing the unearned balance of his initial payment and the full amount of his second payment even though the firm never received his second payment.

When respondent's employment with Law Firm B ended, he left the files of several clients who were not associated with Law Firm B in his office. He did not notify his active clients of his whereabouts and other than leaving the files in a firm with other attorneys, he took no steps to protect his clients' interests.

12. *In re Jacobsen*, 386 S.C. 598, 690 S.E.2d 560 (2010)

Respondent was licensed to practice law in South Carolina on November 16, 1998. Respondent was a member of a statewide bankruptcy firm (the Firm). Respondent and another member of the Firm worked in the Columbia office while the other member of the Firm operated the Greenville office. Respondent's practice was so extensive that it was estimated that he filed between 700 and 800 bankruptcy cases per year.

In the fall of 2003, one of the Firm's members reported to the Bankruptcy Court and to the Commission that Respondent had committed numerous ethical and rule violations.FN3 As a result of Respondent's errors, numerous client matters were dismissed by the Bankruptcy Court. In turn, the Office of the United States Trustee filed an action against Respondent in October 2003, seeking for Respondent to be indefinitely suspended from practicing before the Bankruptcy Court. By consent order dated November 7, 2003, the United States Trustee's complaint was resolved and Respondent was required to: (1) withdraw from practicing before the Bankruptcy Court for a period of one year; (2) consult with Lawyers Helping Lawyers and cooperate with any recommendations thereof for medical or other treatment; (3) complete 8.0 hours of approved legal ethics training and 25.0 hours of approved bankruptcy training; and (4) complete an office review by the Practice Management Assistance Program of the South Carolina Bar. In addition, Respondent was prohibited from resuming practice before the Bankruptcy Court, even after one year from the date of the order, unless Respondent provided the United States Trustee with an affidavit summarizing his compliance with the terms of the consent order.

> FN3. Specifically, it was alleged that Respondent: failed to devote sufficient time and attention to client matters; failed to file complete and accurate bankruptcy schedules and statements of debtors' affairs with the Bankruptcy Court; allowed non-lawyer assistants to execute legal documents on behalf of clients and Respondent without the supervision of a lawyer; allowed non-lawyer assistants to negotiate with adverse parties on behalf of clients without the supervision of a lawyer; failed to meet deadlines imposed by the Bankruptcy Court and the bankruptcy trustees for the provision of information to the court; failed to file or to advise clients regarding the filing of motions to reconsider when such motions would be appropriate; failed to timely correct mistakes in documents filed with the Bankruptcy Court; failed to present meritorious claims of clients to the Bankruptcy Court or to timely object to relief sought against debtor clients by creditors; refused to communicate with clients; negotiated with creditors and settled matters on behalf of debtor clients without appropriate client authority and without informing clients of such action; failed to adequately advise clients regarding the ramifications of certain decisions in their bankruptcy matters; refused to communicate with the Bankruptcy Court and the bankruptcy trustees; and allowed bankruptcy cases to be dismissed in order to avoid confronting the Bankruptcy Court to resolve Respondent's own mistakes through appropriate motions.

Respondent failed to comply with the provisions of the consent order and, in fact, continued to accept new bankruptcy clients.

In October 2003, one of Respondent's partners terminated her relationship with the Firm. Subsequently, Respondent hired an associate attorney to handle the Firm's Columbia bankruptcy practice. Between December 2003 and February 2004, Respondent continued to accept bankruptcy clients with the intention that the new associate would file these clients' petitions. Apparently unable to manage the Firm's caseload, this associate submitted her resignation on February 27, 2004, which became effective on March 5, 2004.

In March 2004, with over 2000 cases pending before the Columbia Division of the Bankruptcy Court, Respondent informed the Firm's employees that the office would be closing. Respondent took no further action to close his practice or notify his clients.

Due to the numerous grievances filed against Respondent and concerns over the management of his trust account, this Court placed Respondent on interim suspension on March 18, 2004. On February 4, 2005, the Commission on CLE suspended. Respondent for failure to comply. In turn, this Court suspended Respondent on April 12, 2005

13. *In re Gray*, 381 S.C. 406, 673 S.E.2d 442 (2009)

After being admitted to the South Carolina Bar in 1989, Respondent moved to New York to practice law. Respondent was admitted to the New York Bar and New Jersey Bar in 1990. In 2001, Respondent moved back to South Carolina when he was hired as an associate by the Law Firm. In December 2003, Respondent's group manager expressed concern to the Law Firm's management committee regarding Respondent's performance. Based on Respondent's year-end performance evaluation, the management committee formalized an "exit strategy," which would provide for Respondent to continue working at the firm for a period of time in order that Respondent could pursue other employment. In preparation for the meeting with Respondent, a member of the management committee accessed Respondent's "timekeeper's records." In doing so, he found a number of improper billing entries in which there were discrepancies between the time billed and the time actually spent on the item. Based on this discovery, the management committee determined that the appropriate course of action was to immediately terminate Respondent on February 4, 2004.

After Respondent's termination, members of the management committee conducted an audit of Respondent's time entries and reimbursement requests from January 1, 2003, through February 4, 2004. During their investigation, they found a file in Respondent's desk containing old airline tickets, altered copies of those tickets, blank reimbursement forms, scissors, tape, and "white-out" solution.

Due to Respondent's actions, the Law Firm filed a letter with the ODC on May 25, 2004. In this letter, the Law Firm outlined Respondent's misconduct leading up to his termination and

explained the results of Respondent's post-termination audit. According to the Law Firm, this investigation revealed "excessive and fictitious time entries on client files during the audit period" and "fictitious travel invoices and tickets." In light of this improper billing, the Law Firm claimed it reimbursed $14,163.31 to the affected clients. The Law Firm also discovered that it had reimbursed Respondent in excess of $600 based on his fictitious travel invoices and airline tickets.

* * *

On December 12, 2007, the Panel conducted a hearing. At the hearing, Disciplinary Counsel presented two members of the Law Firm as witnesses. The first witness, a member of the firm's management committee, explained in detail what transpired before and after Respondent's termination. He testified that in conducting an audit of Respondent's time records he discovered that Respondent had billed more than necessary for his travel and the work performed on clients' cases. He made the decision to further investigate into Respondent's case files after he found billing irregularities. In executing this decision, he searched Respondent's office the morning after Respondent's termination, which led to the discovery of a folder containing materials used to "doctor" the firm's reimbursement forms. Upon further investigation, he determined that Respondent had improperly charged clients and the firm for travel time, travel expenses, airline tickets, and mileage.

A second member of the firm testified he also got involved in the audit of Respondent's files. He testified he was "tasked" with retrieving the original time slips from Respondent's office on February 3, 2004. Around 7:30 p.m. that evening, he went into Respondent's office and found Respondent's time records next to his computer. He then proceeded to copy these records, return the originals, and then left the office around 9:00 p.m. When he returned to his office the next morning around 7:00 a.m., he discovered that the copies he had made the night before were missing from his desk. He also discovered that the original time records were no longer in Respondent's office. After checking with the Law Firm's building security, it was discovered that Respondent had been let into the building some time during the evening of February 3rd.

Although this second witness testified he reviewed Respondent's billing records, he stated he primarily focused on Respondent's improper reimbursement requests as evidenced by the file folder found in Respondent's desk. Based on his investigation, he testified to the following examples of improper reimbursement requests: on several occasions Respondent had altered hotel bills so that he would be reimbursed for a greater amount than was actually charged; Respondent had submitted the same airline ticket or travel expenses twice for reimbursement; and Respondent had altered airline tickets for an amount greater than the actual cost of the ticket.

Crime Victim's Bill of Rights

In the early 1970s, a victims' rights movement emerged in this country. *Ex parte Littlefield*, 343 S.C. 212, 540 S.E.2d 81 (2000). This movement focused on integrating the crime victims' concerns into the criminal justice process. *Id.*, citing Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 21 (Winter 1999). In response to the victims' rights movement, most states enacted statutes that required prosecutors to inform crime victims of all criminal proceedings against their alleged perpetrator. Furthermore, these statutes gave the victim a voice at the critical stages of the criminal justice proceedings. *Littlefield*, citing Tobolowsky, *supra*.

In response to the victims' rights movement, the South Carolina General Assembly enacted several laws to protect victims' rights, including S.C. Code Ann. § 16–3–1505 (Supp. 2017) and S.C. Const. art. I, § 24 (Supp. 2017). *Littlefield*. The General Assembly declared the intent behind section 16-3-1505 was to "ensure that all victims of and witnesses to a crime are treated with dignity, respect, courtesy, and sensitivity." *Littlefield*. On November 5, 1996, South Carolina citizens overwhelmingly ratified the Victims' Bill of Rights, which ensures victims are informed of their rights and any alternative means that might be available to them if the criminal prosecution is unable to meet their needs. *Littlefield*.

Under the Constitution:

§ 24. Victims' Bill of Rights.

(A) To preserve and protect victims' rights to justice and due process regardless of race, sex, age, religion, or economic status, victims of crime have the right to:

(1) **be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse**, throughout the criminal and juvenile justice process, and informed of the victim's constitutional rights, provided by statute;

(2) be reasonably informed when the accused or convicted person is arrested, released from custody, or has escaped;

(3) be informed of and present at any criminal proceedings which are dispositive of the charges where the defendant has the right to be present;

(4) be reasonably informed of and be allowed to submit either a written or oral statement at all hearings affecting bond or bail;

(5) be heard at any proceeding involving a post-arrest release decision, a plea, or sentencing;

(6) **be reasonably protected from the accused or persons acting on his behalf throughout the criminal justice process**;

(7) confer with the prosecution, after the crime against the victim has been charged, before the trial or before any disposition and informed of the disposition;

(8) have reasonable access after the conclusion of the criminal investigation to all documents relating to the crime against the victim before trial;

(9) receive prompt and full restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury, including both adult and juvenile offenders;

(10) be informed of any proceeding when any post-conviction action is being considered, and be present at any post-conviction hearing involving a post-conviction release decision;

(11) a reasonable disposition and prompt and final conclusion of the case;

(12) have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and have these rules subject to amendment or repeal by the legislature to ensure protection of these rights.

(B) Nothing in this section creates a civil cause of action on behalf of any person against any public employee, public agency, the State, or any agency responsible for the enforcement of rights and provision of services contained in this section. The rights created in this section may be subject to a writ of mandamus, to be issued by any justice of the Supreme Court or circuit court judge to require compliance by any public employee, public agency, the State, or any agency responsible for the enforcement of the rights and provisions of these services contained in this section, and a wilful failure to comply with a writ of mandamus is punishable as contempt.

(C) For purposes of this section:

(1) A victim's exercise of any right granted by this section is not grounds for dismissing any criminal proceeding or setting aside any conviction or sentence.

(2) "Victim" means a person who suffers direct or threatened physical, psychological, or financial harm as the result of the commission or attempted commission of a crime against him. The term "victim" also includes the person's spouse, parent, child, or lawful representative of a crime victim who is deceased, who is a minor or who is incompetent or who was a homicide victim or who is physically or psychologically incapacitated.

(3) The General Assembly has the authority to enact substantive and procedural laws to define, implement, preserve, and protect the rights guaranteed to victims by this section, including the authority to extend any of these rights to juvenile proceedings.

(4) The enumeration in the Constitution of certain rights for victims shall not be construed to deny or disparage others granted by the General Assembly or retained by victims. (1998 Act No. 259.)

Under current South Carolina law, prosecutors have more duties toward victims than they have had in the past. For example, under section 16-3-1545, prosecutors must provide and assist victims with victim impact statements; inform victims of the applicable criminal procedures; inform victims of their right to counsel; inform victims of financial assistance, compensation, and fees to which they are entitled; make a reasonable attempt to keep victims informed of the status of their case; confer with victims about the disposition of their case, including plea negotiations; notify victims of each hearing, trial, or other proceeding; intercede with employers when necessary; refer any threats against the victim to law enforcement; minimize inconvenience; and refer victims to counselors when necessary. *Littlfield*, at n. 3.

The Court in *Littlefield* discussed these provisions:

> Prosecutors must respect the rights granted to the victims by the Victims' Bill of Rights, which includes the right to be informed of and attend any criminal proceeding which is dispositive of the charges where the defendant has the right to be present. The Victims' Bill of Rights also establishes a system through which victims can request services and notification of proceedings held during the criminal prosecution.
>
> However, the Victims' Bill of Rights is not a drastic transformation of the criminal justice system whereby the victim is given control over the solicitor's broad discretion. The criminal justice system gives prosecutors, as opposed to victims, broad discretion in deciding which cases to try because prosecutors are less likely to be prejudiced by personal and emotional motives. The South Carolina Constitution and case law place the unfettered discretion to prosecute solely in the prosecutor's hands. "Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense or they may simply decide not to prosecute the offense in its entirety." *State v. Thrift*, 312 S.C. 282, 291–92, 440 S.E.2d 341, 346 (1994). Furthermore, the Court of Appeals held that while prosecutors have some duties to crime victims, "their prosecutorial discretion is not contracted or limited by victims' rights laws." [*Reed v,. Becka*, 333 S.C. 676, 676, 511 S.E.2d 396, 400 (Ct. App. 1999) (the Court of Appeals held the rights of a victim under the Victims' Bill of Rights did not grant her the power to veto a proposed plea agreement)].

> Although prosecutorial discretion is broad, it is not unlimited. The judiciary is empowered to infringe on the exercise of prosecutorial discretion when it is necessary to review and interpret the results of the prosecutor's actions when those actions violate certain constitutional mandates. *Id.* (citing *Thrift*, *supra*). For example, the judiciary may infringe on prosecutorial discretion where the prosecutor bases the decision to prosecute on unjustifiable standards such as race, religion, or other arbitrary factors. *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998). The judiciary can also check prosecutorial discretion by dismissing flawed indictments, directing a mistrial of a case wrongfully brought or prosecuted, or granting a directed verdict for lack of credible evidence. Thus, a prosecutor's discretion is constrained by many sources other than the Victims' Bill of Rights.

Littlefield, at 218-219, 540 S.E.2d at 84.

Anyone desiring to contact a crime victim must be mindful of these provisions. You should also consult a recent Attorney General opinion that concludes:

> To answer your question of whether a defense attorney may contact the Victim of a crime in a criminal case when the court has issued an order prohibiting contact by the defendant with the Victim, based on the current law and rules at this time, this Office believes a court would likely find that South Carolina Rule of Professional Conduct 1.3 would authorize the defense attorney (not in the presence of the defendant) to contact any potential witnesses as a part of "reasonable diligence" in defending a client. We would note that a court would limit such contact to "diligence" in Rule 1.3 related to the incident involving the charges, not to transfer messages by the defendant to the Victim or otherwise attempt to circumvent a court's order prohibiting contact.
>
> However, after a Victim declines to speak with a defense attorney, any contact by the defense attorney, or any third party at his or her direction, would be analyzed based on the South Carolina Rules of Professional Conduct, the Victims' Bill of Rights, case law and statutory law balancing the rights of the defendant with the rights of the Victim with the responsibilities of the defense attorney.
>
> Even though South Carolina's Victims' Bill of Rights does not specifically list the right to refuse to speak with a defense attorney, we believe a court would find a Victim, as any other potential witness, would have such a right to refuse unless a court compels testimony via a subpoena, summons or other order. While a subpoena (or summons) in a criminal case requires the presence of the Victim or other witness in court, it does not require a person to speak to either party except under oath in the courtroom. See, *e.g.*, Rule 13(a), SCRCrimP. Certainly a new or

amended South Carolina Rule of Professional Conduct or an addition to the South Carolina Victims' Bill of Rights could further require notice to Victims by defense attorneys (or third parties) whom they represent (or are working for), that Victims may hire their own attorney and that Victims have the right to refuse to speak to the defense attorney or any third party contacted on their behalf. Such a rule or addition could also add additional penalties in the law for unwanted contact after notice and refusal by a Victim to speak to the defense attorney or a third party.FN7

> FN7 Conduct by a defense attorney, a private investigator or other third party may not meet the statutory elements of a specific crime under the law (*e.g.*, stalking requires fear as an element [S.C. Code § 16-3-1700(C)]; intimidation of a witness requires threat or force [S.C. Code 16-9-340]). Moreover, please note there is a specific exception in the law regarding some offenses against a person for "words or conduct protected by the Constitution of this State or the United States, a law enforcement officer or a process server performing official duties, or a licensed private investigator performing services or an investigation as described in detail in a contract signed by the client and the private investigator pursuant to Section 40-18-70." S.C. Code § 16-3-1700(G).

Nevertheless, until a court or the Legislature specifically addresses the issues presented in your letter, this is only a legal opinion on how this Office believes a court would interpret the law in the matter. There are also many other sources and authorities you may want to refer to for a further analysis. For a binding opinion, this Office would recommend seeking a declaratory judgment from a court on these matters or contacting the South Carolina Office of Disciplinary Counsel or the South Carolina Commission on Lawyer Conduct. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

2015 S.C.A.G., 2015 WL 3636394 (June 2, 2015).